No. 76-333

Supreme Court of the United States

October Term, 1976

UNITED AIR LINES, INC.,

Petitioner,

v.

CAROLYN J. EVANS,

Respondent.

On Writ of Certiorari to The United States Court of Appeals For The Seventh Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO hereby respectfully moves for leave to file the attached brief *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. The purpose of that brief is to call to the Court's attention *Machinists Local* v. *Labor Board,* 362 U.S. 411, a case which states the principle that governs this case but which has not been cited by the petitioner. Counsel for petitioner have consented to the filing of the AFL-CIO's brief *amicus curiae,* but counsel for respondent has declined to do so.

INTEREST OF THE AMICUS CURIAE

The AFL-CIO is a federation of 109 national and interna-

tional unions having a total membership of approximately 14,000,000 men and women. This case is one of three in which review has been granted which bring to this Court for the first time the doctrine developed by the lower courts "that a facially neutral seniority policy may be in violation of Title VII [of the Civil Rights Act of 1964] if its effect is to perpetuate the disadvantages accruing from prior discrimination." (A. 39-40.) (See also *International Brotherhood of Teamsters, et al.* v. *United States, et al.*, Nos. 75-636 and 75-672, and *Teamsters Local Union 657, et al.* v. *Rodriguez, et al.*, Nos. 75-651, 715 and 75-718.

We believe that this "perpetuation" doctrine is wrong. Our reasons are set out in full in the accompanying brief *amicus curiae*. Our interest in presenting those reasons to the Court is two-fold:

First, as we emphasized last Term in our brief in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, it is our view that individuals discriminated against in hire, assignment or discharge because of their race or sex, like individuals discriminated against because of their union membership, should receive a remedy that makes them whole and that therefore includes restoration to the seniority position that they would have had but for the discrimination. But, we also believe that under Title VII as under the National Labor Relations Act that remedy should be accorded only to those who file their claims within the limitations period stated in the applicable statute. For the reasons stated by this Court in *Franks*, it is just and equitable to place the discriminatee who moves to vindicate his rights promptly in his "rightful place" in the seniority system. But the costs to the employees who lose comparative seniority

should not be understated. As this Court noted in *Franks*: "More than any other provision of the collective [bargaining] agreement • • • seniority affects the economic security of the individual employee covered by its terms." (*Id.* at 766.) There is a time at which the "economic security of the individual employees" hired subsequent to an employer's discrimination against others should no longer be subject to question. That point is fixed by the statute of limitations whose chief purpose is repose. As this case shows, the principal vice of the perpetuation doctrine is that the statute of limitations on the original act of discrimination (or alleged act of discrimination) never runs.

Second, the perpetuation doctrine also means that a labor organization that enters into a collective agreement with an employer that contains a seniority system lawful in itself is held to violate Title VII by reason of the employer's unilateral discrimination in hire, assignment, or discharge. For, under that doctrine there is a duty on the union running into the indefinite future to place employees, who claim they were discriminated against in hire, assignment or discharge, but who do not perfect that claim, in the seniority slots they would have occupied if the employer had not discriminated or if the employee had through Title VII directly and successfully attacked that discrimination. Thus, although it is the combination of the employer's discrimination and the putative discriminatee's failure to utilize the procedures provided by the Act to remedy that discrimination which results in the continued adverse effects complained of, the perpetuation theory makes the union liable with the employer. There is nothing in the logic, language or legislative history of Title VII which supports that entirely unfair result.

ISSUE TO BE COVERED IN THE BRIEF AMICUS CURIAE

The burden of the argument developed in the accompanying brief *amicus curiae* is that the governing precedent here is *Machinists Local* v. *Labor Board*, 362 U.S. 411 (*"Machinists"*). In *Machinists*, a National Labor Relations Act case, Mr. Justice Harlan held:

> [W]here conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice • • • the use of the earlier unfair labor practice is not merely 'evidentiary', since it does not simply lay bare a putative current unfair labor practice. Rather it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. (*Id.* at 416-417.)

The *Machinists* decision did not at all turn on any peculiarity of the unfair labor practice there charged. Indeed, one of the prior decisions of the NLRB to which Justice Harlan referred as stating the correct rule involved a layoff lawful in itself but traceable to an earlier unlawful reduction in seniority where, as here, the employee did not file a timely charge against the original act of discrimination. (See *Bowen Products C orp.*, 113 NLRB 731, discussed at 362 U.S. at 419-420.)

As we demonstrate in our argument, the *Machinists* case is this case. For here too the claim is necessarily predicated upon the alleged illegality of a time-barred act, Mrs. Evans termination under United's no-marriage policy. This is clear from Mrs. Evans' own statement of position in this

Court. (Respondent's Brief in Opposition, pp. 2-3, 19-20.) Under Mrs. Evans' "perpetuation" cause of action, the use of the original termination "serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be used in effect results in reviving a legally defunct [unlawful employment practice]." (Cf. 362 U.S. at 417.)

A decisive consideration in *Machinists* was that if a present violation of the Act can be found where it is inescapably grounded upon a prior time-barred violation, the statute of limitations will never run on that prior act, thereby defeating the purpose of the statute of limitations. Here, too, it is clear, from Mrs. Evans' own statement of her position, that, on her view, § 706(d), Title VII's limitations provision, would never run on her original termination. The rule of *Machinists*, and its application to Mrs. Evans' present claim, is therefore essential to avoid the "anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions." (*Campbell* v. *City of Haverhill*, 155 U.S. 610, 616.)

CONCLUSION

For the foregoing reasons, this motion by the American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* in order to call to the Court's attention *Machinists Local* v. *Labor Board*, 362 U.S. 411, a case which states the principle that governs this case but which has not been cited by the petitioner, should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) contingent upon the granting of the foregoing motion by the AFL-CIO for leave to file a brief *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The chain of events that led to this lawsuit predicated on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.*, begins with United's February 1968 termination of Mrs. Evans' employment as a stewardess. In the February 1973 charge she filed with the

Equal Employment Opportunity Commission, and in the complaint she later filed here, Mrs. Evans alleges first that the termination was the product of sex discrimination and thus an unlawful employment practice under § 703(a)(1) of Title VII,[1] and second that United's application to her, commencing with her February 1972 hire, of the Company's present seniority rule whereby employees are credited with continuous-time-in-service rather than all-time-in-service for purposes of allocating certain job benefits is an additional unlawful employment practice.[2]

Mrs. Evans' second cause of action does not proceed on the theory that the continuous-time-in-service rule discrim-

[1] Section 703(a) provides in its entirety:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[2] The events which precipitated this holding were succinctly stated in the opinion below:

> This suit was brought by Carolyn J. Evans, under Title VII of the Civil Rights Act of 1964, to recover seniority and back pay that she allegedly lost because of her separation from employment with United Air Lines. The complaint claims that United discriminated against Evans in February, 1968, when United, by reason of Evans' marriage, forced her to resign her employment as a stewardess. She also asserts, however, a continuing discrimination against her as a result of the current application of United's seniority policies, which consider only continuous time-in-service and thereby perpetuate the adverse effects of the original discriminatory discharge.
>
> • • • On November 7, 1968, United discontinued its policy of requiring stewardesses to remain unmarried, and on February 16, 1972, Evans was again hired as a new employee of United.
>
> • • • Evans filed a charge of discrimination with the EEOC on February 21, 1973—five years after her termination from employment, and more than four years after United eliminated its no-marriage rule. She had not filed any prior charge of discrimination with the EEOC, or with any other government agency, or in any way challenged United's no-marriage rule.
>
> • • • United • • • moved to dismiss the complaint on the ground that Evans had failed to file a charge with the EEOC within ninety days of the alleged unlawful practice, which occurred in February 1968, United claimed, when Evans was forced to resign as a stewardess and her employment and seniority were terminated. • • •
>
> The district court granted United's motion to dismiss the complaint • • •. (A.33-35; footnotes omitted.)

United's "no marriage" rule has been declared an unlawful employment practice. (*Sprogis* v. *United Air Lines*, 444 F.2d 1194 (C.A. 7), *cert. denied* 404 U.S. 991.)

inates against women generally. Indeed, the Court of Appeals expressly recognized that the rule "would appear to be neutral • • • as between male and female employees." (A. 36, n.6.) Rather, as that court noted, Mrs. Evans "claims that a current employment practice or policy, though facially neutral, is unlawful if by its operation it enables prior discrimination to reach into the present, and thus prolongs the effect of such discrimination." (A. 35.) And, as the court below recognized, that claim invokes the "perpetuation" doctrine developed by the lower courts, *viz*, "that a facially neutral seniority policy may be in violation of Title VII if its effect is to perpetuate the dis-

advantages occurring from prior discrimination." (A. 40; footnote omitted.) Thus, to prevail on her second claim as on her first, Mrs. Evans must establish that her 1968 termination was discriminatory. This identity between the two is made manifest in the lower court's opinion:

> It is apparent that United's continuous-time-in-service seniority program may put an employee who has been discharged and later rehired into an inferior seniority position than would have been the case if the employees had not been discharged and, thereby, perpetuates some of the disadvantages resulting from the prior discharge. *If* the prior discharge was itself a discriminatory one, *then* United's seniority policy is an instrument that extends the impact of past discrimination, albeit unintentionally. *Consequently*, the present application of United's seniority policy is deemed to be discriminatory. (A. 39; emphasis added.)

United's response is that Mrs. Evans' claims are time-barred by § 706(d) which provides that an EEOC charge, the timely filing of which is "specifie[d]" by the Act as a "jurisdictional prerequisite that an individual must satisfy before he is entitled to institute a lawsuit" (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47), "shall be filed within ninety days after the unlawful employment practice occurred."[3]

[3] The limitations provision of the 1964 Civil Rights Act, which was in effect when Mrs. Evans was terminated, was denominated § 706(d). In 1972 the limitations provision was amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, (the "1972 EEO Act"), and at the same time was redenominated § 706(e); the new § 706(d) deals with a different subject. To avoid confusion throughout this brief, by "§ 706(d)" we shall always mean the limitations provision be it that of the 1964 Act, the 1972 Act, or both, as the context requires. The original § 706(d) provided as follows:

> A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The major substantive change effected in 1972 is that the 90-day period for filing charges in the first clause is enlarged to 180 days.

2. Before directing our attention to the impact of Title VII's limitation provision here, it facilitates analysis, we believe, to consider the law applicable to this controversy had Mrs. Evans filed a concededly timely EEOC charge directly challenging her termination.

Section 703(a)(1), of course, expressly provides the predicate for such a challenge. That section states that it "shall be an unlawful employment practice for an employer • • • to discharge any individual • • • because of such individual's • • • sex." Section 706(g), the Act's remedy provision, in turn, "empower[s]" the federal courts upon finding a § 703 violation, to "mak[e] whole insofar as possible the victims of [the unlawful] discrimination." (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 ("*Franks*").) And, in *Franks* this Court concluded that "It can hardly be questioned that ordinarily • • • a seniority remedy slotting the victim in that position in the seniority system that would have been [hers but for the discrimina-

tion] will be necessary to achieve the 'make whole' purposes of the Act." (*Id.* at 765-766.) Thus, § 703(a)(1)'s prohibition against discrimination in hire, discharge, and assignment, and § 706(g)'s grant to the courts of the authority to fashion "make whole" remedies provide complete assurance that the complainant will "obtain his rightful place in the hierarchy of seniority according to which • • • employment benefits are distributed." (*Id.* at 768.)

That assurance is not a fortuity; it is inherent in the nature of seniority systems. The essence of the "seniority principles • • • increasingly used to allocate entitlements to scarce benefits among competing employees ('competitive status' seniority) and to compute noncompetitive benefits earned under the contract of employment ('benefit' seniority)" is that time in service with the employer computed from the "company date of hire", or the "departmental date of hire" or an alternate beginning point, is the determinant of, or a factor in, allocation decisions and benefit computations. (*Id.* at 766-767.) If, as in *Franks,* departmental seniority is used, so long as the seniority rules are themselves neutral and they are applied according to their terms, every employee, without regard to color, race, religion, sex or national origin, receives full and equal credit for every day worked in that department. And, the system provides that allocation decisions are made in favor of the individual with the most credits, and that benefit decisions are also directly related to the credits accumulated. Company seniority systems and continuous-time-in-service systems, follow the same pattern, except that a different "hiring" date is utilized in making the computations. Thus, so far as we are able to understand, it is impossible to conceive of such a seniority system that produces results that

are congruent with any variable other than the neutral factor of time worked in the particular department, company, *etc.*

To be sure, as this Court recognized in *Franks,* where a seniority system applies, if the employer discriminates in *hire* (or assignment or discharge), a potential consequence is that the hiring discriminatees will be adversely affected in that they "will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to [the] benefits [allocated according to seniority] his inferiors." (*Id.* at 768.) But, since this adverse effect is the direct product of the hiring system and is therefore confined to the individuals that the particular employer has actually discriminated against in hire, as opposed to minority persons and women generally whom that employer has not discriminated against and who are therefore in their "rightful place in the hierarchy of seniority" (*id.*), the Court also recognized that the "underlying legal wrong affecting them is *not* the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system." (*Id.* at 758; emphasis added.) And, as we have stressed, the ultimate point of *Franks* is that individuals who are the victims of a "racially discriminatory hiring system" (or a racially discriminatory discharge system) who in a timely fashion directly challenge that legal wrong are also assured their "rightful" place in the seniority system.

It is therefore plain that had Mrs. Evans filed a timely charge against her termination and proved that the termination violated § 703(a)(1), she would have been entitled to reinstatement, including restoration to the seniority

position she would have had but for her termination. In order to achieve that result, it would have been unnecessary to create an artificial independent violation, the subsequent refusal to grant her such seniority, and the objectives of the statute of limitations, § 706(d), would also have been fulfilled.

The foregoing demonstrates also a dispositive difference between the problem concerning seniority systems posed in this case and the issue concerning tests confronted in *Griggs* v. *Duke Power Co.*, 401 U.S. 424. The central teaching of *Griggs* is that the "Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation." (*Id.* at 431.) By "practices • • • discriminatory in operation," the Court referred to those which "operate to exclude Negroes," or which "operate as 'built-in headwinds' for minority groups," at least where such "consequence[s] would appear directly traceable to race." (*Id.* at 430-431.) Under this standard, the test challenged in *Griggs* was found to be unlawful because, due to "the inferior education • • • Negroes have long received • • •, [their b]asic intelligence [does not] have the means of articulation to manifest itself fairly in a testing process • • • [and] whites [therefore] register far better • • • than Negroes." (*Id.* at 430.) Thus, the test *in itself* was racially congruent.

On the other hand the passage of time is neutral with respect to race and sex "in form" and "in operation." Consequently time worked for a particular employer or in a particular job category, the determining factor in allocating employment benefits in a seniority system, is not *in itself* race or sex linked. Such a link can be forged, if at all,

only when *that* employer has discriminated in hire, assignment or discharge. Title VII breaks that link directly by making such discrimination an unlawful employment practice and by providing a "rightful place" remedy to the hiring (or assignment or discharge) discriminatees. In this way Title VII guarantees that seniority systems that are neutral in form will also be neutral in operation and thus valid under *Griggs*.

To be sure, this guarantee does not apply where the individual is not entitled to a remedy for the original discrimination. But this occurs only in two situations both of which were dealt with by Congress. One is where the original hiring assignment or discharge discrimination took place before the Act's effective date; the other, exemplified by this case, is where the individual does not file a timely EEOC charge against the original discrimination. In both situations, Congress determined that the applicable seniority system may lawfully be applied according to its generally applicable terms. As to the first situation, the Act preserves then-existing seniority rights despite the adverse effect on pre-Act discriminatees. (See pp. 16-17 and 40-55 *infra*.) With respect to the second, both precedent and principle establish that a time-barred claim may not be the basis upon which present actions otherwise lawful are declared to be a wrong.

3(a) As we show in Part I of the Argument the governing precedent is *Machinists Local* v. *Labor Board*, 362 U.S. 411 (*"Machinists"*). *Machinists* arose in the context of a rule of law stated by the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, that the execution, by an employer and a minority union, of a collective agreement containing a union security clause is unlawful; the question

before this Court was whether the enforcement of such a clause, lawful standing alone, could be held to be an unfair labor practice, when the illegality of enforcement depended upon a showing that the execution had been illegal, and when no timely charge had been filed directly challenging the latter. Mr. Justice Harlan in a characteristically thoughtful and thorough opinion answered the question in the negative. He held:

> [W]here conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice • • • the use of the earlier unfair labor practice is not merely 'evidentiary', since it does not simply lay bare a putative current unfair labor practice. Rather it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. (*Id.* at 416-417.)

The *Machinists* decision did not at all turn on any peculiarity of the unfair labor practice there charged. Indeed, one of the prior decisions of the NLRB to which Justice Harlan referred as stating the correct rule involved a layoff lawful in itself but traceable to an earlier unlawful reduction in seniority where, as here, the employee did not file a timely charge against the original act of discrimination. (See *Bowen Products Corp.*, 113 NLRB 731, discussed at 362 U.S. at 419-420.) And, in *NLRB* v. *Houston Maritime Association*, 426 F.2d 584 (C.A. 5), the Fifth Circuit followed *Machinists*, to bar a complaint by a group of blacks who were denied the opportunity to register with an exclusive union referral hall. At the time of the application the union had, for non-discriminatory reasons, frozen all registration,

but the Board had found that refusal to register these individuals was unlawful because they had previously been denied the opportunity to register for racially discriminatory reasons; no timely charge alleging this earlier denial to be unlawful had been filed. Without reaching the question whether such racial discrimination would constitute an unfair labor practice, Judge Goldberg reversed the Board on the authority of *Machinists*.

> The question • • • is whether the acts of racial discrimination which occurred prior to the § 10(b) period can be used to infuse illegality into the otherwise legal pool so that its maintenance during the six-month period can form the basis of an unfair labor practice charge. The Supreme Court in [*Machinists*] unmistakably prohibited the use of time-barred acts for such a purpose. The referral list absent any discrimination was legal, and to use the time-barred acts of racial discrimination to infuse illegality into that pool is nothing more than "cloak[ing] with illegality that which was otherwise lawful," a result prohibited by § 10(b) of the National Labor Relations Act, 362 U.S. at 417. (*Id.* at 588.)

The *Machinists* case is this case. For here too the claim is necessarily predicated upon the illegality of the time-barred termination under United's no-marriage policy. This is clear from Mrs. Evan's own statement of position in this Court. (Respondent's Brief in Opposition, pp. 2-3, 19-20.) Under Mrs. Evans' theory, the use of the original termination "serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be used in effect results in reviving a legally defunct [unlawful employment practice]." (Cf. 362 U.S. at 417.)

A decisive consideration in *Machinists* was that if a pres-

ent statutory violation can be found where it is inescapably grounded upon a prior time-barred violation, limitations will never run on that prior act, thereby defeating the purpose of the statute's limitation provision. (See also *N.L.R.B.* v. *Pennwoven, Inc.*, 194 F.2d 521, 525 (C.A.3) and *N.L.R.B.* v. *Childs Co.*, 195 F.2d, 617, 621 (C.A.2) (L. Hand, J., concurring).) Here, too, it is clear, from Mrs. Evans' own statement of her position, that, on her view, § 706(d), Title VII's limitations provision, will never run on her original termination. For she contends that whenever United applies its continuous-time-in-service seniority policy to affect any condition of her employment, she may bring a new employment discrimination charge essential to which is that her original termination was illegal. (Res. Br. in Opp., pp. 2-3.)

The rule of *Machinists*, and its application to Mrs. Evans' present claim, is therefore essential to avoid the "anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions." (*Campbell* v. *City of Haverhill*, 155 U.S. 610, 616.) To hold that Mrs. Evans' claims are time-barred is in no way to depricate the importance of Title VII's anti-discrimination policy. It is the very nature of a statute of limitations that it will bar claims which would have been legitimate, and would have resulted in relief to the plaintiff, if the claim had been timely asserted. In *Machinists* Justice Harlan also recognized that the strong substantive policy of a law does not justify nullifying its limitations provision by permitting plaintiffs to establish that time-barred conduct not directly attacked was unlawful in order to convert present conduct otherwise lawful into a wrong.

> It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The 'policy of the Act' is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it • • •. (362 U.S. at 428.)

The same reasoning applies with equal force to Title VII, as this Court recognized only the other day in *Electrical Workers* v. *Robbins & Myers*, ... U.S. ....., 45 L.W. 4068. There, the Court rejected the contention of the plaintiff that tolling of the statute of limitations during the processing of a grievance under an applicable collective agreement should be permitted because "tolling would impose almost no costs • • •". (*Id.* at 4070.) Mr. Justice Rehnquist replied for the Court:

> [T]he principle answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision', *Alexander* v. *Gardner Denver Co.*, [415 U.S. 36] at 47, Congress did not leave to courts the decision as to which delays might or might not be "slight". (*Id.*, footnote omitted.)

The reasoning in *Electrical Workers* applies *a fortiorari* here where Mrs. Evan's contention would not merely toll the statute of limitation during the processing of a grievance alleging a discriminatory discharge, but prevent limitations from ever running on the allegedly discriminatory termination which forms the essential predicate of her "perpetuation" cause of action.

(b) The Court of Appeals' opinion in this case fails entirely to consider that under its decision Mrs. Evans' claim that her original termination was unlawful will never be time-barred; indeed the opinion gives no weight whatsoever to § 706(d). That court rested on 1) implications which it drew from *Franks, supra,* 424 U.S. 474; 2) its reading of the legislative history of the 1972 EEO Act; and 3) its reliance on the lower court precedents articulating the "perpetuation" doctrine which the Court of Appeals regarded as controlling. In Part II of the Argument we show that the Court of Appeals was wrong in all three respects.

First, in *Franks,* this Court held that an individual who has established in a Title VII proceeding that he has been discriminated against in violation of § 703 with respect to hire is entitled as part of the remedy granted by the court under § 706(g) to restoration of the seniority position he would have had but for the unlawful discrimination. The Court held further that § 703(h), which the *Franks* Court of Appeals had construed to bar the award of such seniority relief, does not limit the courts' remedial powers under § 706(g). Rather, § 703(h) was held to be "definitional"; "as with the other provision of § 703, subsection (h) delineates which employment pratices are illegal and thereby prohibited and which are not." (424 U.S. at 758.)

Since the Court proceeded on the premise that § 706's scope is broader than § 703's, the holding that § 706(g) authorizes a court which has found a § 703 violation to order the employer to remedy that violation by granting the discriminatee "rightful place" seniority does not, as the court below thought, lead to the conclusion that an employer's failure to grant back seniority to an individual against

whom he had previously discriminated in hire (or discharge) is an independent § 703 violation.

Second, the Court of Appeals also misread *Franks* when, in order to determine the legality of United's conduct, it relied on the legislative history of the 1972 EEO Act. For, whereas that history was relevant to the remedy issue in *Franks,* because the 1972 Act did amend § 706(g), the evolution and background of that Act throw no light on the question of what is employment discrimination under § 703, a provision which the 1972 Congress did not touch in any presently material respect.

Third, the Court of Appeals' reliance on the "perpetuation" doctrine was unjustified. Under that doctrine, which originated in *Quarles* v. *Phillip Morris, Inc.,* 279 F.Supp. 505 (E.D. Va.), the present application of a seniority system is deemed to be an unlawful employment practice if it adversely effects persons who were previously discriminated against on the basis of race or sex. *Quarles* itself involved the application of seniority rules to individuals who had been discriminated against in hire or assignment before the effective date of Title VII. Its basic theory was that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act." (*Id.* at 516.) That theory simply has no application to those who, like Mrs. Evans, claim that they were first discriminated against *after* the effective date of the Act. For, under *Franks,* such an individual cuts off the adverse consequences of an unlawful refusal to hire or an unlawful discharge by filing a timely charge, and securing his "rightful place" as a remedy for that violation. Thus, if Mrs. Evans' had filed a timely charge against her discharge under

United's "no-marriage" policy, as did Mrs. Sprogis (see *Sprogis* v. *United Airlines, supra,* she would have been entitled to receive reinstatement with back pay and seniority credit from the time of her discharge.

Additionally, the "perpetuation doctrine" is erroneous in the context in which it originally arose. It is, of course, true that *Franks* does not aid a person who was discriminated against in hire or assignment before the effective date of Title VII to obtain the seniority status that he would have had but for that discrimination, and that the "perpetuation doctrine" is indispensible for securing pre-Act discriminatees these seniority benefits. However, the decisive objection to the doctrine is that Congress deliberately determined that the Act would not alter the seniority status which pre-Act discriminatees had when the Act came into effect, but chose instead to protect the seniority status of the incumbents with whom the discriminatees were in seniority competition.

The conclusion would be compelled that Congress did intend, in *Quarles* words to "freeze" comparative seniority, even if the legislative history were silent. For, the first rule of construction is that "legislation must be considered as addressed to the future, not to the past • • • [and] a retrospective operation will not be given to a statute which interferes with antecedent rights • • • unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' " (*Green* v. *United States,* 376 U.S. 144, 160, quoting *Union Pacific R. Co.* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 199.) Plainly, a rule which requires the reduction of one employee's "competitive status seniority" (*Franks,* 424 U.S. at 766) as of the time of the Act in favor of other individuals because the latter had previously

been discriminated against is "interference with antecedent rights."

But Congress was not silent. The sponsors of the 1964 Civil Rights Act gave repeated assurances that "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." (110 Cong. Rec. 7213 (1964), quoted in *Franks,* 424 U.S. at 759. See also 110 Cong. Rec. at 7207, quoted 424 U.S. at 759-760, and the like assurances quoted *id.* at 759 n.15, and 760-761 n.16.) To make assurance double sure the Mansfield-Dirksen substitute included § 703(h) which transformed these representations into positive law as part of "defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. (*Id.* at 761.) The efforts of some lower courts to escape the consequences of § 703(h) and its history call to mind once again what this Court admonished in interpreting the 1972 EEO Act: "the plain, obvious and rational meaning of a statute is always to be preferred to any currious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." (*Chandler* v. *Roudebush,* 425 U.S. 840, 844.)

ARGUMENT

I

1. The problem—inherent in any limitations provision—of whether time-barred claims may be the basis upon which present actions otherwise lawful are declared to be a wrong is not one of first impression in this Court. It was squarely presented in *Machinists Local* v. *Labor Board,* 362 U.S. 411

(*Machinists*), a case arising under the National Labor Relations Act.

There, a union that did not represent a majority of a unit of employees, negotiated a collective agreement covering that unit which contained a clause recognizing the union as the exclusive bargaining agent and a "union seniority" clause requiring all unit employees to join and remain members of the union. (*Id.* at 412.) It is an unfair labor practice to *enter into* such an agreement under these circumstances (*id.* at 413-414), but no charge was filed with the National Labor Relations Board within the six-month period after the commission of that wrong as required by § 10(b) of the NLRA.[4] Instead, 10 months after the execution of the agreement a charge against the union was filed and was sustained by the NLRB on the following theory:

> The Board starts with the premise that a collective bargaining agreement which contains a union security clause valid on its face, but which was entered into when the Union did not have a majority status, gives rise to two independent unfair labor practices, one being the execution of the agreement, the other arising from its continued enforcement. Conceding that a complaint predicated on the *execution* of the agreement here challenged was barred by limitations, the Board contends that its complaint was nonetheless timely since

[4] Section 10(b) of the NLRA provides in pertinent part:

> Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

> it was "based upon" the parties' continued *enforcement,* within the period of limitations, of the union security clause. It is then said that even though the former was itself time-barred, the unlawful execution of the agreement was nevertheless "relevant in determining whether conduct within the 6-month period was unlawful," 119 N.L.R.B., at 504: and that evidence as to it was admissible because § 10(b) is a statute of limitations, and not a rule of evidence. (*Id.* at 415, emphasis in original.)

The unions responded by:

> contend[ing] that, standing alone, the union security clause and its enforcement were wholly innocent; that they were tainted only by virtue of the original unlawful execution of the agreement; and that since a complaint based upon that unfair labor practice was barred by limitations, that event itself could not be utilized to infuse with illegality the otherwise legal union security clause or its enforcement. They say, in short, that to apply in this situation the doctrine that § 10(b) is a statute of limitations, and not a rule of evidence, is to circumvent the purposes of the section, and that acceptance of the Board's position would mean that the statute of limitations would never run in a case of this kind. (*Id.* at 415-416.)

The Court concluded that the unions' "position represents the correct view of the matter". (*Id.* at 416.) Mr. Justice Harlan's analysis merits extensive quotation:

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first

is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign. * * *

* * *

Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation

over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships. (*Id.* at 416-417, 419; footnotes omitted.)

The *Machinists* decision did not at all turn on any peculiarity of the unfair labor practice there charged. Indeed, one of the prior decisions of the NLRB to which Justice Harlan referred as stating the correct rule involved a layoff lawful in itself but traceable to an earlier unlawful reduction in seniority where, as here, the employee did not file a timely charge against the original act of discrimination. (See *Bowen Products Corp.*, 113 NLRB 731, discussed at 362 U.S. at 419-420.)[5] And, in *NLRB* v. *Houston Maritime Association*, 426 F.2d 584 (C.A. 5), the Fifth Circuit followed *Machinists* in circumstances nearly identical to the present.

The *Houston Maritime* case involved the operation of an exclusive hiring hall by Local 1351 of the International Longshoremen's Association. Beginning in the summer of

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[5] The *Machinists'* opinion described the *Bowen* case as follows:

In *Bowen Products* an employee recalled from layoff was discriminatorily placed at the bottom of the relevant seniority list. He unsuccessfully attempted to obtain his proper seniority rating, and several months later was included in an economic reduction in force. Had his seniority originally been properly computed, he would not have been laid off at that time. The charge was filed and served within six months of the layoff, but more than six months after the original determination of seniority statu Finding that the only basis for a holding of unlawful layoff would be a finding that determination had been a violation of the Act, the Board dismissed the complaint. (*Id.* at 420, n. 12).

1963, five blacks, the charging parties, made attempts to register for union referral. Their early attempts were unsuccessful because union policy forbade the registration of blacks. On September 3, 1963, the union instituted a new "temporary overload policy" designed to correct the disorganized and unmanaged condition of its referral roster. The effect of this policy was that no applicants, black or white, were accepted for registration. Only those who had registered prior to September 3, 1963 were referred through the hiring hall until July, 1965, when the temporary overload policy was terminated and a racially non-discriminatory merit system was instituted. In 1964, while this temporary overload policy was in effect, the charging parties and others went to the hiring hall but were informed on each occasion that they could not register. Finally, on March 11, 1965, Leon Phelps filed a charge with the NLRB against the union after the union's president told him when he again attempted to register that they were still working on the union policy regarding registration.

The Board issued a complaint based on the assumption that a racially discriminatory refusal to refer from an exclusive hiring hall violated §§ 8(b)(2) and 8(b)(1)(A) and implicated the employer in a violation of §§ 8(a)(3) and 8(a)(1). The Court of Appeals found it unnecessary to pass on that interpretation of the unfair labor practice provisions of the Act. It rejected, for lack of substantial evidence on the record as a whole the Board's determination that the refusal to register the charging parties when they applied in late 1964 and 1965 was racially motivated. And, that Court also rejected, on the authority of *Machinists*, the Board's "alternative finding that racial discrimination occurred within the period due to the maintenance by the

Union of an illegal pool of workers." (426 F.2d at 588.)

Judge Goldberg stated:

> The Board's argument in this respect is that the Union created an all white pool of workers by its earlier racial discrimination and that the effect of the temporary overload policy was to maintain this illegal pool. The Board found that the maintenance of this pool during the § 10(b) period was itself an unfair labor practice even if no racially motivated refusal to register the charging parties took place within that time. Unfortunately this position is untenable in view of the Supreme Court's opinion in Local Lodge No. 1424, International Ass'n. of Machinists v. NLRB, 1960, 362 U.S. 411. (*Id.*)

He then quoted the paragraph from *Machinists* beginning "It is doubtless true • • •" (set out above at pp. 19-20), and continued:

> As we understand the distinction drawn by the Court in *Local Lodge No. 1424*, it is permissible in the case before us to consider the evidence regarding the Union's prior acts of racial discrimination to shed light on the true motivation behind the refulsals to allow the the charging parties to register during the six-month period. The evidence of prior acts is therefore admissible in support of the claim that racially motivated refusals to register the charging parties occurred within the § 10(b) period. This evidence was admitted and considered for that purpose. However, when viewed in light of the record as a whole we have found it insubstantial in view of the Union's evidence, credited by the Trial Examiner, that the Union's temporary policy of refusing to register anyone was not racially motivated.
>
> The Board's alternative finding regarding the continuing illegality of the pool of workers because of the

prior acts of racial discrimination falls in the second category described by the Supreme Court in *Local Lodge No. 1424*. It is an attempt to revive a 'legally defunct' act and is barred by § 10(b). *There is no claim that an all white pool of workers is, standing alone, illegal. Rather the charge here is that racial discrimination created an all white pool, and it is the discrimination which is the basis of the unfair labor practice charge and the basis for the pool's claimed illegality. Some act of racial discrimination is therefore required in order to give the Union's referral list an illegal character.* Assuming arguendo that the discrimination here asserted would be an unfair labor practice—a point which we reluctantly decline to decide—and would therefore create an illegal pool of workers, it is nevertheless plain that absent any discrimination the Union's referral roster would be a legal pool of workers. We have found on the record as a whole that no act of racial discrimination occurred within the § 10(b) period. The question, therefore, is whether the acts of racial discrimination which occurred prior to the § 10 (b) period can be used to infuse illegality into the otherwise legal pool so that its maintenance during the six-month period can form the basis of an unfair labor practice charge. The Supreme Court in *Local Lodge No. 1424* unmistakably prohibited the use of time-barred acts for such a purpose. The referral list absent any discrimination was legal, and to use the time-barred acts of racial discrimination to infuse illegality into that pool is nothing more than 'cloak[ing] with illegality that which was otherwise lawful,' a result prohibited by § 10(b) of the National Labor Relations Act, 362 U.S. at 417. We therefore reject the Board's alternative finding that acts of racial discrimination occurred within the limitation period because of the Union's maintenance of an illegal pool of workers. (*Id.* at 588-589; emphasis added.)

2. The parallel between *Machinists* and the instant case is precise.

In *Machinists* the NLRB contended that the execution of the collective agreement containing a union security clause and the enforcement of that clause were separate unfair labor practices, and that while the former was time-barred because of the failure to file a charge within six months of the date of execution, the latter was not. This Court, as we have seen, held that if the NLRA's limitations provision was to be given its due weight, the enforcement could not be held to be an unfair labor practice because its legality or illegality depended upon the legality or illegality of the time-barred execution.

Here, Mrs. Evans contends that her original discharge, and the application to her of the Company's continuous-time-in-service seniority rule after she was rehired, are separate violations of Title VII. She concedes that the former was time-barred and rightly so, for this Court held only the other day in *Electrical Workers* v. *Robbins & Myers, Inc.* ..... U.S. ....., 45 L.W. 4068, 4069 (Dec. 20, 1976), that a discharge is a "final" unlawful employment practice at the time the affected individual "stopped work and ceased receiving pay and benefits." But she argues that the application of the seniority rule is a non-time-barred violation.

United, like the company and union in *Machinists*, replies that the current employment practice complained of—the seniority rule and its application— is wholly innocent, that the only taint to that rule and its application is the original allegedly discriminatory termination, and that since a charge against that unlawful employment practice is time-barred, that act cannot be utilized to infuse with illegality

the otherwise lawful current employment practice. And, Mrs. Evans expressly agrees, indeed insists, that the "perpetuation" violation with which she charges United "is a present act or practice, explicitly *based* on the past discrimination, which gives new on-the-job effect to the past discrimination."[5]

On the reasoning of *Machinists,* United is entitled to prevail. To paraphrase Justice Harlan's analysis, "the use of the earlier [unlawful employment practice] is not 'evidentiary,' since it does not simply lay bare a putative current [unlawful employment practice]. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be used in effect results in reviving a legally defunct [unlawful employment practice]." (Cf. 362 U.S. at 417.)

As Justice Harlan recognized, allowing the limitations bar to be lifted for the purpose of characterizing the legality of present conduct "would mean that the statute of limitations would never run" on the original completed ac-

[5] Respondent's Brief in Opposition, p. 19, emphasis in original. See also *id.* at 19-20:

> Viewed in this light, it is evident that the seeming anomaly suggested by United between the rights of former employees who are not rehired and former employees who are rehired simply does not exist. In both cases, one must look to the current practice being challenged, and determine whether that current practice is based upon prior discrimination. If, as in *Collins* [v. *United Airlines,* 514 F.2d 594 (C.A.9)] it is not so based, the plaintiff fails. If, as in *Evans,* the current practice *is* improperly based, the plaintiff succeeds. Thus, the cases were rightly decided, and are logically and pragmatically consistent with each other.

tion. (362 U.S. at 416.) See also *id.* at 425, and the opinions of Judge Goodrich for the court in *N.L.R.B.* v. *Pennwoven, Inc.,* 194 F.2d 521 (C.A. 3),[6] and the concurrence of Judge Learned Hand in *N.L.R.B. v. Childs Co.,* 195 F.2d 617 (C.A. 2).[7]

[6] If we take the position that a discriminatory failure to reinstate an employee is to be treated like a continuing tort, that employee's case will never be closed until it is finally litigated. Ten years after the event, he can still file charges that he was discriminatorily discharged and that he should be reinstated with back pay. The Board concedes that his back pay would only start from the day six months before the filing of the charges. But subject to this limitation, on the Board's argument, his claim for reinstatement and back pay will keep on so long as he lives or until he is reinstated. We do not think that such an interpretation of the statute accomplishes the legislative purposes. (*Id.* at 525.)

[7] I concur, but by an interpretation of § 10(b) of the Labor-Management Relations Act not quite the same as that of the opinion in chief. The question is as to the meaning of the words any unfair labor practice occurring more than six months prior to the filing of the charge, and, as I understand the opinion, this limitation ran against Potter only because he demanded reinstatement in, and restoration to, his original position with back pay and seniority. Had he merely asked for new employment dating from the time of his demand, it would have been an independent unfair labor practice to refuse him, although the refusal were for the original reason: *i.e.,* that the union unlawfully demanded it. *It is indeed possible so to read the words, but it seems to me that to do so defeats the purpose of the limitation, because it results in making a new unfair labor practice out of each repeated refusal of the employer to relent and retract. The necessary consequence is that the initial wrong can be made to persist indefinitely, unless the employer finally recants and the same must be also true as to the union.* (*Id.* at 621, footnote omitted, emphasis added.)

Likewise, it is clear from Mrs. Evans own statement of her position that if her view were accepted, the statute of limitations would never run on the 1968 termination:

> Carolyn Evans argued below, and the Court of Appeals accepted her position, that a "loss" has occurred and has been implemented on every day of her reemployment, continues to the present, and will continue tomorrow unless checked. For example, whenever United determines Mrs. Evans' wages, her flight assignments, her fringe benefits' and whether or not she is to be laid off or recalled, it engages in its seniority practice. Each time, United has admittedly chosen to treat the 1968 termination as a break in service, and by currently relying on that past act, it has inexorably tied that past discrimination to its present treatment of Mrs. Evans' seniority.[8]

The teaching of *Machinists* is that to avoid this "anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions" (*Campbell* v. *City of Haverhill,* 155 U.S. 610, 616),[9] a limitations

[8] Res. Br. in Opp., pp. 2-3, footnote omitted.

[9] In *Campbell,* the Court established that when Congress creates a cause of action without declaring a federal statute of limitations because "it cannot have been within the contemplation of the legislative power" that there be no limitation to the claim, the presumption must be that Congress intended the state statues of limiations governing actions of a similar nature to apply. (*Id.*) The Court quoted with approval (*id.* at 616-617) what Chief Justice Marshall had said in *Adams* v. *Woods,* 2 Cranch (6 U.S.) 336, 342: "This [the absence of any statutory bar] would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

provision bars reliance on the alleged illegality of conduct that was not timely challenged and was completed outside the limitation period, not merely for the purpose of securing a remedy for the time-barred conduct itself but for the purpose of making out a claim which necessarily depends on establishing that the time-barred conduct was illegal. The holding of that case is essential to preserve the integrity of the principle of repose which animates every statute of limitations.

It is the very nature of a statute of limitations that it will bar claims which would have been legitimate, and would have resulted in relief to the plaintiff, if the claim had been timely asserted. But as *Machinists* recognizes, this provides no justification for nullifying a limitations provision by permitting plaintiffs to establish that time-barred conduct not directly attacked was unlawful in order to convert present conduct otherwise lawful into a wrong. Justice Harlan there rejected the view that the "interest in employee self-determination * * * given large recognition" in the NLRA's substantive provisions "outweighed otherwise important competing considerations of burying stale disputes" embodied in the Act's limitations provision. (362 U.S. at 428.)

> We think this analysis inadmissible here, for the reason that the accommodation between these competing factors has already been made by Congress. It is commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. * * * As expositor of the

> national interest, Congress, in the judgment that a six-month limitations period did "not seem unreasonable," HR Rep. No. 245, 80th Cong., 1st Sess., p. 40, barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights. (*Id.* at 428-429, footnote omitted.)

This reasoning applies here with equal force. No one, who like the AFL-CIO, participated actively in securing the enactment of Title VII will ever forget that its enactment, like that of Taft-Hartley "entail[ed] the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable." (*Id.* at 428.) And, the adoption of the 90-day limitations period of § 706(d) in the Mansfield-Dirksen compromise which broke the filibuster against the 1964 Civil Rights Act shows that in 1964 as in 1947 repose was a "competing interest" which had to be accommodated to secure the enactment of any legislation.[10] "As expositor of the national interest" (362 U.S. at 428), Congress in Title VII established a 90-day limitations period (subsequently enlarged to 180 days) "to ensure expedition in the filing and handling of [discrimination] complaints." (*Love* v. *Pullman Co.*, 404 U.S. 522, 526.)

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[10] Whereas the House version of Title VII followed the NLRA in granting an individual with a claim six months to file a charge, one of the "softening [changes to] the enforcement provisions of Title VII" insisted upon in the Senate was a shortening of that period to 90 days. (See Equal Employment Opportunities Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (GPO), p. 3053 (the annotated text of the House bill showing the Senate changes) p. 3066 (statement by Sen. Clark).) The House accepted this and the other Senate amendments without a conference in order to avoid a resumption of the filibuster which, as all recognized, would have doomed enactment of any bill.

But we need not belabor the particulars which demonstrate that § 706(d) has the same place in Title VII that § 10(b) has in the NLRA. For this Court has just squarely declined an invitation to serve other interests by ameliorating § 706(d)'s terms. In *Electrical Workers* v. *Robbins & Myers, supra,* the petitioners argued that "utilization of grievance procedures tolls the running of the limitations period which would otherwise begin on the date of firing." (45 L.W. at 4068.) In support of that contention they "contend[ed] at some length that tolling would impose almost no costs, as the delays occasioned by the grievance-arbitration process would be 'slight'." (*Id.* at 4070.) Mr. Justice Rehnquist replied:

> [T]he principal answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites "with precision," *Alexander* v. *Gardner-Denver Co.*, [415 U.S. 36] at 47, Congress did not leave to courts the decision as to which delays might or might not be "slight." (*Id.*, footnote omitted.)

In *Electrical Workers* the petitioners sought only a modest extention in the time permitted for filing a charge claiming discrimination in discharge. Here, of course, the result sought is that the time period for filing such a charge never runs. The conclusion that the *Electrical Workers* holding mandates rejection of Mrs. Evans claim and adoption of the *Machinists* principle follows *a fortiorari*. For Justice Rehnquist's reasoning embodies the deference to the balance struck by Congress in selecting a particular limitations period that is the hallmark of *Machinists* and that Justice

Harlan summed up in the final sentence of that opinion: "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy. . . ." (362 U.S. at 429.)[11]

II

The Court of Appeals' opinion in this case fails entirely to consider that under its decision Mrs. Evans' claim that her original termination was illegal will never be time-barred; indeed the opinion gives no weight whatsoever to § 706(d). That court rested on 1) implications which it drew from *Franks* v. *Bowman Transportation Co. supra;* 2) its reading of the legislative history of the 1972 EEO Act; and 3) its reliance on the lower court precedents articulating the "perpetuation" doctrine which the Court of Appeals regarded as controlling. But as we now show, 1) not only is the Court of Appeals' reading of *Franks* wrong, but that decision, if correctly understood further buttresses our view that both of the unlawful employment practices alleged by Mrs. Evans are time-barred; 2) the 1972 legislative history has nothing to do with the present issue; and 3) the theory of the original "perpetuation" cases is inapplicable to Mrs. Evans; moreover, that theory is unsound.

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[11] While *Electrical Workers* rejects a case-by-case interest balaning approach to Title VII limitations questions, out of an abundance of caution we note that the apparent simplicity of determining whether Mrs. Evans' 1968 termination was an unlawful employment practice is atypical.

As this Court recognized in *McDonnell Douglas Corp.* v. *Gree*, 411 U.S. 792, 800-806, the trial of a claim of hiring, assignment or discharge discrimination normally requires the trier of fact to resolve conflicting claims concerning evanescent events and is therefore inherently complex. In a class action hiring discrimination case these complexities are multiplied in determining which of the affected class members are actual discriminatees. (See *Franks*, 424 U.S. at 772-773, and n.s. 31 and 32.) These difficulties are most aggrivated in perpetuation cases which frequently require reconstruction of employment decisions made 10 or even 20 years before the EEOC charge was filed. These cases have therefore proved to be perhaps the most time-consuming of all Title VII cases to try. (See, e.g., the Fifth Circuit's felt-need to develop sophisticated techniques for managing such cases reflected in *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (C.A.5).)

As Congress recognized in both the NLRA and Title VII, when a statute prohibits discrimination, the requirement of prompt notice enforced by a brief statute of limitations is particularly apt. "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." (*Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 348-349.)

[12] In the lower courts a limitations problem arose with respect to the individual claim of the named plaintiff in *Franks;* that issue was resolved in Franks' favor. (See 495 F.2d 398, 402-406.) The

1. In its original decision, the Court of Appeals, agreeing with the District Court, held that in both of the unlawful employment practices alleged by Mrs. Evans are time barred. However, the court below reversed its position on rehearing believing that the opposite result was required by this Court's intervening decision in *Franks.* The Court of Appeals was clearly mistaken in drawing this implication from *Franks.*

In *Franks* the proceedings which resulted, *inter alia,* in a finding that the employer had discriminated in hire had been timely begun, and no statute of limitations issue was presented or decided in this Court.[12] Rather, the problem of the case was that "nonemployee black applicants who ap-

plied for and were [discriminately] denied" certain jobs had been denied by the lower courts "any form of seniority relief." "Only" the propriety of that denial of *relief* was "before" the Court "for review." (424 U.S. at 750-752.) In resolving that remedy problem the *Franks* Court held that "that the Court of Appeals erred in concluding that, as a matter of law, § 703(h) barred the award of seniority relief [sought]" (*id.* at 762), and answered in the affirmative "the question whether an award of seniority relief is appropriate under the remedial provisions of Title VII, specifically, § 706(g)" (*id.*).

Thus, the Court did not hold that § 703 makes it an unlawful employment practice for an employer to apply a seniority system that does not discriminate against minorities or women generally to an individual with a claim that the employer had discriminated against him in hire. Indeed, the Court underlined the point that it was proceeding on the premise that the discrimination in hiring was the only § 703 violation before it:

> The underlying legal wrong affecting [the plaintiffs] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. (*Id.* at 758.)

Here, of course, the question is whether, where the claim of initial discrimination is time-barred, the failure to grant back seniority to the putative discriminatee is a § 703 violation.

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issue in this Court arose out of the claims of two classes represented not by Franks, but by one Lee. (See 424 U.S. at 750-752.)

To be sure, if the Court had stated or implied that the substantive obligations imposed by § 703 on employers and unions, and the remedial powers granted the courts by § 706(g) are identical or that the remedial power has a narrower scope, *Franks'* reasoning could be said to support the decision below. But this Court adopted the opposite interpretation of the Act: the heart of its analysis of § 703 (h)—the provision the *Franks* Court of Appeals had taken to bar the relief sought—was that § 706(g) has a *broader* scope than § 703:

> On its face, § 703(h) appears to be only a definitional provision; as with the other provision of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. Section 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 703(g), 42 U.S.C. § 2000e-5(g), in circumstances where an illegal discriminatory act or practice is found. Further, the legislative history of § 703(h) plainly negates its reading as limiting or qualifying the relief authorized under § 706(g). (*Id.* at 758-759.)

It is therefore plain that the holding that § 706(g) authorizes a court which has found a § 703 violation to order the employer to remedy that violation by granting the discriminatee "rightful place" seniority does not, as the court below thought, lead to the conclusion that an employer's failure to grant back seniority to an individual to grant back seniority to an individual against whom he had previously discriminated in hire (or discharge) is an independent § 703 violation.

2. The opinion below not only proceeds on a misunderstanding of *Franks'* basic holding, but also of the portion of

the opinion at 424 U.S. at 764-765, n. 21, discussing the legislative history of the 1972 EEO Act. *Franks*, as we have seen, was concerned with the proper interpretation of "the remedial provisions of Title VII, specifically § 706(g)." (*Id.* at 762.) And, the 1972 EEO Act did amend § 706(g). (See *id.* at 763-765 n. 21.) In *Franks*, this Court therefore canvassed the legislative history of this clearly relevant 1972 amendment to the provision before it. (See also, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414, n. 8, 420-421, which, like *Franks*, turned on § 706(g) and for that reason discussed the 1972 amendments.)

But the question to which the court below addressed itself was not one of remedy but of what acts are to be "deemed to be discriminatory" and hence unlawful employment practices. (A. 39-40.) The 1972 amendments throw no light on this § *703* question.

The 1972 EEO Act revised the enforcement mechanism of Title VII and covered certain employers previously excluded from the reach of the Act. (See generally *Chandler* v. *Roudebush*, 425 U.S. 840, 848-858.) Only one narrow, and entirely non-controversial, amendment to § 703, completely removed from the problem presented here, passed the Congress in 1972.[13] Indeed, so far as we are aware, no legis-

[13] That amendment was described as follows in the Section By Section Analysis of H.R. 1746, 118 Cong. Rec. 7166 (1972):

SECTIONS 8 (a) and (b)

These subsections would amend sections 703(a) and 703(c)(2) of the present statute to make it clear that discrimination against applicants for employment and applicants for membership in labor organizations is an unlawful employment practice. This subsection is merely declaratory of present laws as contained in the decisions in *Phillips* v. *Martin-Marietta*

lative proposal touched on whether the application of seniority systems otherwise lawful where the "effect is to perpetuate the disadvantages accruing from prior discrimination" (A. 40) is an unlawful employment practice. Accordingly, the Committee Reports and the floor debate are all but barren of any discussion that could possibly be deemed relevant to the proper resolution of this case.[14] Since Congress' attention was directed elsewhere, the 1972 legislative history does not even provide helpful guidance to

Corp., 400 U.S. 542 (1971); *U.S.* v. *Sheet Metal Workers International Assn., Local 36* 416 F.2d 123 (8th Cir. 1969); *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969).

[14] As explained in Part I, *supra*, the instant case implicates the interrelationship between §§ 703 and 706(d). While the 1972 EEO Act did not amend the former, it did extend from 90 days to 180 days the limitations period stated in the latter. But the 1972 legislative history does not address the question presented here. This is not surprising. The decision below which, as we have noted, does not even treat with the implications of § 706(d) for the validity of the "perpetuation" doctrine, typifies the approach of the cases enunciating that doctrine.

The only substantial discussion of § 706(d) is that contained in the Section by Section Analysis of H.R. 1746, *supra*:

Section 706[d]—This subsection sets forth the time limitation for filing charges with the Commission.

Under the present law, charges must be filed within 90 days after an alleged unlawful employment practice has occurred. In cases where the Commission defers to a State or local agency under the provisions of section 706(c) or (d), the charge must be filed within 30 days after the person aggrieved receives notice that the State or local agency has terminated its proceedings, or within 210 days after the alleged unlawful employment practice occurred, whichever is earlier.

This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved

the courts in determining what conduct constitutes an unlawful employment practice. Certainly, nothing in the EEO Act, or its legislative history, can be considered a leg-

person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which was determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected. It is intended by expanding the time period for filing charges in this subsection that aggrieved individuals, who frequently are untrained laymen and who are not always aware of the discrimination which is practiced against them, should be given a greater opportunity to prepare their charges and file their complaints and that existant but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight. Moreover, wide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertence, delay or error.

The time period for filing a charge where deferral is required to a State or local antidiscrimination agency has been extended to 300 days after the alleged unlawful employment practice occurred or to 30 days after the State or local agency has terminated proceedings under the State or local law, whichever is earlier. This subsection also restates the provision of Section 706(b) requiring a notice of the charges to the respondent within ten days after its having been filed.

As this Court recognized in *Electrical Workers* v. *Robbins & Myers, supra,* 45 L.W. at 4070-4071, the desire to "give the aggrieved person the maximum benefit of the law" does not justify departing from the requirement that EEOC charges are to be filed within the time period stated in the law. And, the holding in that case cuts directly against Mrs. Evans' reading of the Act which "means that the statute of limitations would never run" (*Machinists,* 362 U.S. at 416) on a discriminatory discharge. It is not contended here, nor in light of *Electrical Workers* could it be,

islative ratification of the lower court decisions interpreting § 703.[15]

3. As the court below correctly said, "It has been held in a number of instances that a facially neutral seniority policy may be in violation of Title VII if its effect is to perpetuate the disadvantages accruing from prior discrimination." (A. 39-40.) But the court below again misread *Franks* when it asserted that "*Franks* confirms these decisions." (A. 40.) On the contrary, *Franks'* principal holding demonstrates that the underlying rationale of the "perpetuation" doctrine does not apply to Mrs. Evans at all, and *Franks* interpretation of § 703(h) exposes one of several reasons why the perpetuation doctrine is fundamentally opposed to the Congressional intent.

a. The fountainhead of the doctrine is the following sen-

that Mrs. Evans' 1968 termination is a continuing violation. To be sure, the application to her since her 1972 hire of the continuous-time-in-service rule is "continuing in nature". Thus, the Section by Section Analysis does support the conclusion that if application of the rule is an unlawful employment practice, then Mrs. Evans is entitled to file her EEOC charge within 180 days "from the last occurrence of the discrimination and not from the first". But the question here is whether application of that rule under the circumstances of this case *is* discrimination prohibited by § 703. If it is not, the continuing violation doctrine plainly has no application. Finally, this case is not one of "existent but undiscovered acts of discrimination."

The sum of the matter is that the 1972 legislative history provides no warrant for departure from the sound principle enunciated in *Machinists.*

[15] While the foregoing is, we believe, more than sufficient to demonstrate that n. 21 of the *Franks* opinion does not pertain to the question here, we believe it proper to add with all deference that one portion of that footnote, not necessary to the decision in *Franks,* is unsound:

The legislative history underlying the 1972 amendments

tence in *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505, 516 (E.D. Va.):

> Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.

Whatever the merit of this observation (which we discuss at pp. 43-56 *infra*) it simply has no application to Mrs. Evans—for, as already explained (pp. 5-9 *supra*), unlike pre-Act discriminatees Mrs. Evans did not need to rely on the "perpetuation" doctrine to avoid the consequence of the original discriminatory termination. Whereas an individual who was discriminated against in hire or discharge before the enactment of Title VII could avoid the post-Act consequences of that discrimination only by the creation (legislative or judicial) of a duty to relieve him of those consequences—which is what the perpetuation doctrine does

completely answers the argument that Congress somehow intended seniority relief to be less available in pursuit of this goal. In explaining the need for the 1972 amendments, the Senate Report stated:

"Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements." S. Rep. No. 92-415, *supra*, at 5.

See also H.R. Rep. No. 92-238, *supra*, at 8. In the context of this express reference to seniority, the Reports of both Houses cite with approval decisions of the lower federal courts which granted forms of retroactive "rightful place" seniority relief. S. Rep. No. 92-415, *supra*, at 5 n. 1; H.R. Rep. No. 92-238, *supra*, at 8 n. 2. (The dissent, *post*, at 796-797, n. 18, would

—an individual who suffers such discrimination *after* the effective date of the Act can avoid the consequences of that § 703 violation whether or not the imposition of those consequences is declared to be an unlawful employment practice. If Mrs. Evans had filed a timely charge against her discharge under United's "no-marriage" policy, as did Mrs. Sprogis (see *Sprogis* v. *United Airlines, supra*, 444 F.2d 1194) she would have been entitled to receive reinstatement with back pay and seniority credit from the time of her discharge.

Under *Franks*, a discriminatee who pursues his statutory rights against an act of hiring or discharge discrimination is put in his "rightful place" as a § 706(g) remedy for the violation. To achieve that result it is unnecessary to stretch the substantive provisions of § 703 and to nullify the statute of limitations in § 706(d) through the "perpetua-

distinguish these lower federal court decisions as not involving instances of discriminatory *hiring*. Obviously, however, the concern of the entire thrust of the dissent—the impact of rightful-place seniority upon the expectations of other employees—is in no way a function of the specific type of illegal discriminatory practice upon which the judgment of liability is predicated.) Thereafter, in language that could hardly be more explicit, the analysis accompanying the Conference Report stated:

"In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed *that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.*" Section-By-Section Analysis of H.R. 1746, accompanying The Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166 (1972) (emphasis added).

The passage in S. Rep. No. 92-415 quoted above was included in the section of the Report entitled "NEED FOR THE BILL"

tion" doctrine. And, for this reason, the doctrine itself is wholly unsound, at least with respect to those who were first discriminated against in hire, discharge and assignment after the effective date of the Act and therefore were entitled to a make whole remedy so long as they filed a timely EEOC charge. The Court of Appeals' view that United had violated the Act by failing to "recant" (see L. Hand, J. in *N.L.R.B.* v. *Childs Co., supra,* quoted at p. 27, n. 7, *supra*) in response to Mrs. Evans claim that her termination outside the limitation period, and not perfected by a timely EEOC charge, was an unlawful employment practice attributes to Congress the intention to grant by implication in §703 that which it barred in § 706(d).

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and as the entire discussion in that subpart makes clear, was part of the Committee's explanation of its recommendation that the EEOC should be granted the authority to issue judicially enforceable orders. In H.R. Rep. 92-238, the same passage was included in the subsection entitled "CEASE AND DESIST ENFORCEMENT POWERS" and serves the same purpose. The House, in approving the Erlenborn substitute to the committee bill, the Senate, in approving the Dominick amendment to the committee bill, and both in accepting the Conference Committee's resolution of the differences in those two amendments *rejected* the suggestion that the EEOC should be granted these powers. (Chandler v. Roudebush, *supra,* 425 U.S. at 848-858.) Committee reports supporting proposals which were not enacted have previously been denied weight in ascertaining the meaning of legislation (see, e.g., *Labor Board* v. *Drivers Local Union,* 362 U.S. 274, 288-290), and since they do not constitute the views of the sponsors of the legislation enacted should not, according to the basic principles of statutory construction, be given any weight (see *Schwegmann Bros.* v. *Calvert Distillers,* 341 U.S. 384, 394-395). (Compare, *Chandler,* 425 U.S. at 859, n. 36.)

Further, we cannot read the portions of the Senate and House Reports discussed in n. 21 of *Franks* as "cit[ing] decisions of the lower courts • • • with approval." The case citations in question

b. We have thus far assumed that the "perpetuation" doctrine is valid in its original pre-Act discrimination context, for the present case must be decided in petitioner, United's, favor even if that assumption is indulged. However, an alternative ground for reversing the lower court's judgment is that the doctrine, which is an essential ingredient in the result reached below, is fundamentally unsound because Congress did not intend to readjust the seniority rights of pre-Act discriminatees as against the rights obtained by whites (or other non-discriminatees) before the Act; instead, when the issue was raised in the debates, the 1964 Congress deliberately chose to preserve existing seniority rights, as an essential part of the compromise which made enactment of the legislation possible.

1. In the absence of any evidence in the debates, the conclusion would be compelled, as a matter of ordinary statutory interpretation, that Title VII was to have prospective operation only, and that existing seniority rights were to remain undisturbed. For it has been long understood that:

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past

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annotate the sentence in each of those Reports which states in summary fashion the manner in which many experts "describe the [discrimination] problem" and the "subjects" often "discuss[ed]" in the "literature". There is no indication that the conclusions of these experts or the results reached by the lower courts, in general or in the particular relevant here, correctly capture the intent of the 1964 Congress as expressed in Title VII. This statement in the Reports is descriptive, not normative.

One final point. The assumption in the Section By Section Analysis ("it was assumed") that lower court decisions as of that time would govern the interpretation of Title VII "[i]n any area where the new law does not address itself" is just that—an assumption. It does not purport to be, and cannot be, a wholesale enactment of

> • • • [and] a retrospective operation will not be given to a statute which interferes with antecedent rights • • • unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (*Greene* v. *United States*, 376 U.S. 144, 160, quoting *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199.)

Plainly, a rule which requires the reduction of one employee's "competitive status' seniority" (*Franks*, 424 U.S. at 766) as of the time of the Act in favor of other individuals because the latter had previously been discriminated against "interferes with antecedent rights."

Congress, of course, has the power, if it chooses to do so, to provide post-Act relief for conduct occuring prior to (and therefore not violative of) the enactment of a new statute. A recent law imposed post-act liability for pre-act conduct is the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. § 901 *et seq.* which was held to be constitutional in *Usery* v. *Turner Elkhorn Mining Co.*, ... U.S. ....., 44 L.W. 5181, 5185-5187. Thus, whether such a result is desirable or not is beside the point. The question in each

these lower court decisions—whatever they may have held, and regardless of their reasoning and mutual consistency or inconsistency—into positive law. Nor, consistent with accepted principles of statutory interpretation, can this statement in the Section By Section Analysis be given weight in interpreting Title VII as enacted by the 1964 Congress. Even at best, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (*United States* v. *Price*, 361 U.S. 304, 313.) And here, the entire legislative history and the very breadth of the statement negate the possibility that the 1972 Congress in amending certain sections of Title VII focused on what was intended by the 1964 Civil Rights Act with respect to "area[s] where the new law does not address itself • • •," or studied the whole corpus of lower court decisions interpreting Title VII in those areas.

instance is whether Congress did intend to "interfere with antecedent rights"; the "first rule of construction" is that such an intention must be clearly shown. That question was answered in the affirmative in *Turner Elkhorn* because Congress had consciously and unequivocally decreed that answer. Title VII, far from 'unequivocal[ly]" and "inflexib[ly]" providing for retrospective effect, was authoritatively explained as having prospective effect only; and it was amended, in the course of passage, by the addition of § 703(h) to expressly protect existing seniority rights. This Congressional action, detailed in the *Franks* opinion (424 U.S. at 759-761) is, even absent the presumption of non-retroactivity, dispositive against the *Quarles* line of decisions—as we next show.

2. As this Court observed in *Franks:*

> The initial bill reported by the House Judiciary Committee as H.R. 7152 and passed by the full House on February 10, 1964, did not contain § 703(h). Neither the House bill nor the majority Judiciary Committee Report even mentioned the problem of seniority. That subject thereafter surfaced during the debate of the bill in the Senate. This debate prompted Senators Clark and Case to respond to criticism that Title VII would destroy existing seniority systems by placing an interpretive memorandum in the Congressional Record.[16]

The full text of the memorandum pertaining to seniority status is:

> *Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example,* if a business has been discriminating in the past and as a result has an all-white

[16] U.S. at 759, footnotes omitted.

working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. *He would not be obliged—or indeed, permitted*—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or *once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.* (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)[17]

At the same time, Senator Clark placed in the Congressional Record a Justice Department statement concerning Title VII:

> *First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect.* If, *for example,* a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. *It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of* course, if the seniority rule itself is discriminatory, it

[17] 110 Cong. Rec. 7207 (1964) quoted in *Franks,* 424 U.S. at 759, n. 15 (emphasis added).

would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. *Any differences in treatment based on established seniority rights would not be based on race and would not forbidden by the totle.*[18]

Senator Clark also introduced into the Congressional Record a set of answers to a series of questions propounded by Senator Dirksen, two of which are pertinent to the issue of seniority:

> Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> Answer. Seniority rights are in no way affected by

[18] 110 Cong. Rec. 7207 (1964) quoted in *Franks,* 424 U.S. at 760, n. 16 (emphasis added). The memorandum had been prepared by the Department "in rebuttal to the argument made by the Senator from Alabama [Mr. Hill] to the effect that Title VII would undermine the vested rights of seniority * * * and that Title VII would impose the requirement of racial balance" (110 Cong. Rec. 7213). Senator Hill was then the Chairman of the Committee on Labor and Public Welfare.

the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.

Question: If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists.[19]

These assurances that the bill "is not retroactive," that "Title VII would have no effect on seniority rights existing at the time it takes effect" and that the bill "will *not* require employers to change existing seniority lists" could not have been plainer or more unqualified. Yet so great was the concern that existing seniority rights be preserved and protected, and so essential was the cooperation and approval of Sen. Dirksen, the minority leader, if the filibuster was to be broken and a civil rights bill enacted, that steps were taken to make assurance double sure. That was the function of § 703(h).

Several weeks after Sen. Clark's foregoing representations, and "following formal conferences among the Senate leadership, the House leadership, the Attorney General and others, * * * a compromise substitute bill prepared by Senators Mansfield and Dirksen, Senate majority and minority leaders respectively, containing § 703(h) was introduced on the Senate floor." (424 U.S. at 760-761.) The "thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the

[19] 110 Cong. Rec. 7217 quoted in *Franks*, 424 U.S. at 760-761, n. 17.

post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." (*Id.* at 761.) And as this Court noted:

> Senator Humphrey, one of the informal conferees, later stated during debate on the substitute that § 703 (h) was not designed to alter the meaning of Title VII generally but rather merely clarifies its present intent and effect. 110 Cong. Rec. 12723 (1964). (*Id.*)

Thus, § 703(h) must be read as codifying the representations and assurances expressed by Sen. Clark and in the Department of Justice memorandum.[20]

3. These legislative statements directly answer in the neg-

[20] The pertinent portion of § 703(h) provides

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply difference standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *.

In light of the background just detailed, the phrase "bona fide" has its natural meaning of "good faith" and serves to assure that the seniority system is generally applicable and in fact generally applied and not an ad hoc contrivance. This conclusion is reinforced by comparing the "bona fide" phrase with its counterpart "professionally developed" in the portion of § 703(h) dealing with "ability tests". And, in light of the legislative history, the limitation of § 703(h)'s permission to exclude seniority systems that are "the result of an intention to discriminate" must refer to seniority systems adopted for the purpose of discriminating against minority groups or women and not to seniority systems adopted for other purposes which have the effect of disadvantaging individuals discriminated against in hire or assignment prior to Title VII's effective date. For the latter interpretation of the exclusion nullifies the assurances of its sponsors.

ative the question whether Congress intended to provide a cause of action against a seniority system which fails to remedy the effects of pre-Act discrimination. Yet, remarkably, the lower courts, have reached a result contrary to that which Congress mandated. Starting from the premise that Congress "could not" have meant to do what it did—to look forward and not to disturb preexisting relationships even though these relationships were affected by pre-Act discrimination—these courts have found their way around Congress' intent. The seminal cases in the development of the "perpetuation" theory, *Quarles* v. *Phillip Morris, Inc.*, *supra* and *Local 189, United Papermak. & Paperwork.* v. *United States*, 416 F.2d 980 (C.A. 5), circumvent the plain meaning of the legislative materials quoted above by deeming them to refer only to cases of pre-Act *hiring* discrimination and not to pre-Act *assignment* discrimination. So, it was said in *Papermakers:*

> No doubt, Congress, to prevent "reverse discrimination" meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination. As the court pointed out in *Quarles*, the treatment of "job" or "department seniority" raises problems different from those discussed in the Senate debates: "a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system." 279 F.Supp. at 517.
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> It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of th previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. (*Id.* at 994.)

We begin by noting that this distinction between "hiring" and "assignment" discrimination on the ground that a hiring discriminatee has not earned "actual" seniority but that an assignment discriminatee has, is precisely the one which lead the *Frank's* Court of Appeals into error in dealing with post-Act discrimination. As this Court explained in correcting that error:

> The distinction plainly finds no support anywhere in Title VII or its legislative history. Settled law dealing with the related "twin" areas of discriminatory hiring and discharges violative of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, provides a persuasive analogy. "[I]t would indeed be surprising if Congress gave a remedy for the one which it denied for the other." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 187 (1941). For courts to differentiate without justification between the classes of discriminatees "would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed." *Id.*, at 188.

(424 U.S. 768, 769.)

It would, we submit, be equally surprising if in dealing with pre-Act discrimination, "Congress gave a remedy for one which it denied for the other."

Assuming that *Franks* is not dispositive we now treat with the distinction on the merits contrary to the Quarles view the applicant for a whites-only job who was turned down for that job and was offered a job open to blacks is not worse off than the applicant who was denied any job with an employer. On the contrary, he is better off, because he was given a choice between taking a job or looking elsewhere, a choice not open to the applicant who was turned down completely. Again, even if the situation of the two applicants is compared only with respect to seniority, the black applicant who took a job where the employer had a departmental seniority system is better off than the applicant who received no employment at all and who therefore obtained no seniority benefits with the employer.

Quarles and its progeny take internally inconsistent positions with respect to the value of departmental seniority. These opinions regard departmental seniority to be of sufficient value that they deem a requirement to give up that seniority to be too high a price for transferring to the previously white only department. Yet they do not recognize that the applicant who was turned down completely must give up whatever seniority he has achieved with his present employer in order to now take the job in the formerly white only department of the employer who had turned him down.

Moreover, these opinions treat departmental seniority as discriminatory between blacks and whites because they fail to recognize that departmental seniority protects employees

in each department from bumping by employees in other departments who have greater seniority on an employer-wide basis. Thus, if one assumes that before the Act there was an all-black department and an all-white department, and that the white department was skilled and the black unskilled and lower paid—a classic case of the discrimination at which the "perpetuation" doctrine is directed—in the event of a layoff among the skilled (white) employees the departmental seniority system protects black employees from being bumped by white employees who have worked for the employer for a longer period. For example, if, anticipating a reduced need in skilled personnel, the employer stops hiring into the skilled department but continues to hire into the unskilled unit, when it becomes necessary to lay off from the skilled department, the junior skilled employees, all of whom will have more years of service with the employer, would not be able to use that seniority to bump the employees in the unskilled department who had less employer seniority but who enjoyed departmental seniority.

The distinction drawn in the *Quarles* line of cases likewise makes no sense if it is examined from the viewpoint of those whose seniority as of the effective date of the Act is sought to be reduced in favor of those who had been discriminated against prior to the effective date of the Act and were hired into another department. For, it matters not to an employee whose expectations are defeated whether he is suddenly made junior to an individual who has been working in a different department, or one who has been working for a different employer. In either situation the job security which he has built up over the years is undermined by the operation of the Act. And this, of course, is the precise result against which Sen. Hill had warned, but which

the proponents of Title VII unequivocally disavowed.

This brings us to the more basic objection to the distinction between employment seniority and departmental seniority drawn in *Quarles* and its progeny: Even if a substantial rational distinction could be drawn, that is, if the equities of past discriminatees are greater where they have been hired into an inferior job rather than into none at all, or the legitimacy of the expectations of the white incumbents in the two situations could somehow be differentiated, the courts would still not be free to write that distinction into law. For, the legislative record is clear that Congress drew no such lines, adopted no such sophisticated distinctions, but unqualifiedly and unequivocally determined that the Act would be wholly prospective in its operation and that existing seniority rights would be preserved.

The *Quarles-Papermakers* doctrine relies on the fact that in some of the legislative statements reference is made to the rights of Negroes who had not been hired because of their race. But the opinions erroneously treat as a limitation of the principle that seniority rights would not be affected by language which in the statement was used only as an *illustration* of that principle. Thus:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, *for example*, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis.[21]

[21] 110 Cong. Rec. 7213, (emphasis added).

> Title VII would have no effect on seniority existing at the time it takes effect. If, *for example*, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.[22]

Not only does the *Quarles* reading disregard the phrase "for example," but it gives no weight to the many other statements that categorically deny any adverse effect on existing seniority rights. Thus, immediately following the language of the Justice Department memorandum quoted immediately above the following was declared:

> Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race.[23]

And, of course, Sen. Clark's answers to Sen. Dirksen's questions, quoted at pp. 47-48 *supra*, contained nothing from which an argument can even be attempted that in some situations existing seniority rights would be adversely affected.

Finally, the language of § 703(h) does not support or even suggest the distinction between employment seniority and departmental seniority which the *Quarles* line draws. The only possible basis for the opposite contention is the

[22] *Id.* 7210, (emphasis added).
[23] *Id.*

phrase "bona fide seniority or merit systems." But those words seem to be singularly ill-chosen to convey the distinction between existing seniority systems which adversely affect individuals who have not been hired at all, and those which adversely affect, among others in a department, those who had been turned down for a better (whites only) job. Indeed, parsing § 703(h) to create this distinction reverses history. As Sen. Humphrey made clear, § 703(h) was adopted, at the insistence of those who feared that seniority rights might be eroded, to embody into positive law the unequivocal assurance that those fears were unjustified. (See p. 48, *supra.*) To read that section more narrowly than those assurances is to treat the provision as an instrument for sapping the vitality of the sponsors' guarantees in a large, if not the largest, class of cases.

Indeed, the entire effort to explain away and dilute the unequivocal representations that Title VII would be prospective in operation and that seniority rights would not be adversely affected defames the integrity of the entire legislative process. It assumes that Sen. Clark and the Justice Department, and later Sen. Humphrey, engaged in carefully Aesopian language designed to appear to assure other members of Congress that seniority was absolutely protected but containing within it qualifications to enable courts to undermine such rights and to give § 703 an effect precisely the opposite of that which was understood in 1964. This transforms the sponsors of Mansfield-Dirksen substitute bill into the witting or unwitting deceivers of the other Senators to whom—as majority and minority leaders respectively—they had a special obligation of good faith. It should be unnecessary to say that such aspersion on those who were instrumental in achieving the enactment of Title

VII is unworthy.

In short, the effort to escape the consequences of the enactment of § 703(h) and the legislative history of that provision call to mind once again what this Court admonished in interpreting the 1972 EEO Act: "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." (*Chandler* v. *Roudebush, supra,* 425 U.S. at 848.) The courts which, adopted or approved the "perpetuation doctrine" have not fulfilled their duty to "reconstitute the gamut of values current at the time"; they have rebelled against those values. (Cf. *Woodwork Manufacturers* v. *NLRB,* 386 U.S. 612, 620 quoting L. Hand, J.)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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